



## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

This bill does not appear to implicate any of the House Principles.

#### B. EFFECT OF PROPOSED CHANGES:

##### **BACKGROUND**

##### Open Government Sunset Review Act

The Open Government Sunset Review Act sets forth a legislative review process for newly created or substantially amended public records or public meetings exemptions. It requires an automatic repeal of the exemption on October 2<sup>nd</sup> of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.

The Act provides that a public records or public meetings exemption may be created or maintained only if it serves an identifiable public purpose, and may be no broader than is necessary to meet one of the following purposes:

- Allowing the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- Protecting sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety. However, only the identity of an individual may be exempted under this provision; or,
- Protecting trade or business secrets.

If, and only if, in reenacting an exemption that will repeal, the exemption is expanded (essentially creating a new exemption), then a public necessity statement and a two-thirds vote for passage are required because of the requirements of Art. 1, s. 24(c), Florida Constitution. If the exemption is reenacted with grammatical or stylistic changes that do not expand the exemption, if the exemption is narrowed, or if an exception to the exemption is created (e.g., allowing another agency access to the confidential or exempt records), then a public necessity statement and a two-thirds vote for passage are not required.

##### Public Employee Optional Retirement Program

The Florida Retirement System (FRS) was created in 1970 as the successor entity to two separate state and local government pension plans. The Department of Management Services (DMS) administers benefit payments while the State Board of Administration (SBA) is the investment manager.

Since 2001, newly-hired and existing employees have been permitted to choose between the defined benefit plan and a defined contribution alternative, called the "Public Employee Optional Retirement Program"<sup>1</sup> (PEORP). The PEORP is an optional defined contribution retirement plan in which employer contributions, based on membership class, are made to an account established for the participant. The participant can then choose, from a number of investment funds which span the risk-return spectrum, how to invest those contributions. Benefits are provided through employee directed investments in accordance with s. 401(a) of the Internal Revenue Code. Further, benefits accrue in individual accounts that are participant-directed, portable, and funded by employer contributions and earnings thereon.<sup>2</sup>

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<sup>1</sup> Sections 121.4501-121.5911, F.S., provide for the Public Employee Optional Retirement Program.

<sup>2</sup> Section 121.4501(7), F.S.

The PEORP offers a diversified mix of low-cost investment products that span the risk-return spectrum and may include a guaranteed account as well as investment products, such as individually allocated guaranteed and variable annuities. Offerings may include mutual funds, group annuity contracts, individual retirement annuities, interests in trusts, collective trusts, separate accounts, and other financial instruments.<sup>3</sup>

Under the PEORP, the SBA selects and contracts with approved providers. The SBA has been delegated authority by the Legislature to establish criteria to evaluate and select approved providers and products.<sup>4</sup> The SBA has contracted with CitiStreet to be the third party administrator of the plan.

### PEORP – Public Records Exemption

Current law provides that all personal identifying information regarding a participant in PEORP contained in Florida Retirement System records held by SBA or DMS, or their agents, employees, or contractors, is exempt from public records requirements. The department or board may use the exempt information in any legal or administrative proceeding. In addition, access is available to information regarding the providers and products that are selected by program participants and the amount of money invested in those products.

If identifying information of PEORP participants was released, anyone could find out how much money a participant had with an investment provider and in a particular investment product. Investment totals owned by an individual normally would be considered private information and could not be readily obtained by alternative means.

Pursuant to the Open Government Sunset Review Act,<sup>5</sup> the exemption will repeal on October 2, 2007, unless reenacted by the Legislature.

### **EFFECT OF BILL**

The bill removes the repeal date, thereby reenacting the public records exemption. It also removes unnecessary language.

As currently drafted, the exemption extends to “employees, agents, or contractors” of DMS and SBA. It should be noted that employees of DMS or SBA, or any other agency for that matter, only have access to exempt information as part of their employment with that agency. As such, it is unnecessary and redundant to reiterate that the information in their hands is protected. Further, agents and contractors of DMS and SBA, as well as other agencies, have access to these protected records only because of their agency relationship with these public entities. The definition of agency provided in s. 119.011, F.S, includes “. . . any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.” As agents of the public agencies, they are subject to the same public records requirements as the public agencies, which includes providing access to public records, as well as protecting information in them that is confidential or exempt. As a result, the phrase “employees, agents, or contractors” has been removed from the exemption.

Additionally, the exemption expressly authorizes the use of the exempt information in any legal or administrative proceeding. This provision also is unnecessary. First, the information is exempt only and not confidential and exempt. As such, DMS and SBA are not prohibited from releasing the information in all circumstances. Further, creation of an exemption does not bar use of that protected information in legal or administrative proceedings. As such, this unnecessary provision has been removed from the exemption.

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<sup>3</sup> Section 121.4501(9)(b), F.S.

<sup>4</sup> Section 121.4501(9)(b) and (c), F.S.

<sup>5</sup> Section 119.15, F.S.

C. SECTION DIRECTORY:

Section 1 amends s. 121.4501, F.S., to remove the repeal date and to remove unnecessary language.

Section 2 provides an effective date of October 1, 2007.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

**III. COMMENTS**

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds. This bill does not reduce the percentage of a state tax shared with counties or municipalities. This bill does not reduce the authority that municipalities have to raise revenue.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

D. STATEMENT OF THE SPONSOR

No statement submitted.

#### IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES

None.